APPENDIX A

No. St. 92
August Term, 1965

STATE OF WISCONSIN: IN SUPREME COURT

State of Wisconsin,

Respondent

v.

Lewis Cohen,

Appellant

APPEAL from a judgment of the circuit court for Milwaukee county:

HERBERT J. STEFFES, Circuit Judge. *Affirmed.*

The appellant, Lewis Cohen, M.D., was convicted on October 27, 1965, following a trial to the court, of criminal abortion in violation of sec. 940.04(1), Stats., and sentenced to a term of two years' imprisonment. The defendant waived being tried before a jury.

The facts will be recited in the opinion.

Statute Involved.

"940.04 Abortion. (1) Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both."

GORDON, J.

A Review of the Evidence.

Since the appellant has challenged the sufficiency of the evidence, it becomes necessary that we review the evidence. The intrinsic nature of the case forecloses any great delicacy.

On April 12, 1963, Patricia Hanley, an eighteen-year-old, unmarried resident of Minneapolis, was informed by her physician that she was pregnant. Patricia told her friend, Roberta Dahl, of her condition and of her desire to have a miscarriage. Pursuant to Roberta's suggestion, Patricia took some quinine pills and a mustard bath in an attempt to cause a miscarriage.

Patricia testified that on April 16 or 17, 1963, Roberta telephoned the defendant, Dr. Cohen, from the Dahl home and made arrangements for a visit with him in Milwaukee. She said that she and Roberta arrived at Dr. Cohen's office at about 8 a.m. on April 20, 1963, and that she then paid Dr. Cohen $400 upon his request.

Patricia further testified that she went into an examining room, removed her clothing except for a half slip, and positioned herself on her back upon a table. She stated that Dr. Cohen inserted some medical instruments into her body and she experienced internal pain and a pulling sensation in the vagina. Patricia claimed that the doctor told her he was having some trouble "getting parts of it out."

The procedure in the doctor's office lasted about forty-five minutes; Miss Hanley stated that thereafter Dr. Cohen gave her a supply of ergot tablets to stop any bleeding. She said that she thought she put on a pad after the treatment and prior to leaving the doctor's office. The two women then took a bus back to their hotel, rested for about an hour and a half and then returned to Minneapolis by train.

Patricia stated that her supply of ergot pills ran out four or five days after leaving Milwaukee and that she began to bleed in small amounts. She said that on May 5, 1963, she began to hemorrhage and evacuated some blood

clots. She explained that when this occurred again on May 15th she was prompted to call Dr. Cohen, who told her to purchase some ergot pills and also advised her to consult her family physician.

Patricia entered Minneapolis General Hospital on May 15, 1963, and remained there until May 17, 1963, under the care of Dr. Donald Johnson, whom she told about the prior events at the defendant's office. Dr. Johnson testified that he diagnosed her condition as an incomplete abortion; he performed a uterine curettage, removing several fragments of placental tissue.

Miss Hanley testified that on May 17, 1963, she signed a statement at the Minneapolis police department detailing her involvement with Dr. Cohen. Milwaukee authorities were informed of the transaction, and on June 6, 1963, an investigator in the Milwaukee county district attorney's office transmitted the complaint to the appellant.

Miss Hanley said that on the following day, June 7, 1963, she received a telephone call from Attorney Donald Jacobson, representing Dr. Cohen, who asked her to meet him at the Milwaukee Road depot in Minneapolis. Patricia added that she and Roberta went to the depot and met with Mr. Jacobson, who advised her that if she wrote a letter to the Milwaukee authorities exculpating Dr. Cohen, the case would probably be dropped and Patricia could avoid any publicity and thereby protect the boy involved. Patricia testified that she told Mr. Jacobson that her statement to the Minneapolis police was truthful, but she nevertheless consented to write the letter (Exhibit 4), which she said was designed to have the case dropped.

Patricia said that after the letter was written Mr. Jacobson gave her $400, although he had not previously mentioned money as an inducement. She acknowledged that

Mr. Jacobson did not threaten her and that he "was a gentleman at all times." Patricia stated that she later received $72 from Mr. Jacobson to cover her hospital bill. At the trial, Miss Hanley stated that the contents of the letter (Exhibit 4) were not true.

On June 23, 1963, Patricia gave a statement to Mr. Hugh O'Connell, of the Milwaukee county district attorney's office, in which she repeated her inculpation of Dr. Cohen. This statement contained assertions regarding her bleeding before seeing Dr. Cohen and regarding the latter's comments about blood clots. These aspects of the evidence will be considered more closaly in a subsequent portion of this opinion.

Dr. Cohen testified that he had known Ann Dahl, Roberta's mother, for about two years prior to April, 1963, having once treated her. He further stated that Mrs. Dahl had sent people with social diseases to him on numerous occasions, and that in March, 1963, she had brought her daughter, Roberta, to Dr. Cohen to determine if Roberta was pregnant.

Dr. Cohen stated that Mrs. Dahl telephoned him on April 18 or 19, 1963, and told him that her daughter's friend, Patricia Hanley, "was pregnant, that she had taken quinine pills, hot mustard baths, and she began to hemorrhage and [was] flowing very heavy." Dr. Cohen testified that he advised Mrs. Dahl to take the girl to a local hospital but that Mrs. Dahl pleaded with him to be merciful and to treat her to prevent her parents from discovering her pregnancy. According to Dr. Cohen, he told Mrs. Dahl that he would take care of her but could not perform any operation if such was necessary.

The appellant testified that Patricia and Roberta arrived at his office on the morning of April 20, 1963, and that Patricia advised him that she had started bleeding about

six days before coming to Milwaukee, that Mrs. Dahl had advised her to take quinine pills, that she had had very strong cramps and pain, that she had begun to bleed very heavily after taking the pills, and that she had passed blood clots prior to seeing him.

Dr. Cohen stated that upon examining Patricia, he noticed blood clots in the lower part of her vagina, which he cleaned out with a forceps. He also claims to have observed a piece of necrotic tissue protruding from the cervical canal and discovered that Patricia had a retroverted uterus which caused pain when pressed forward. He stated that he told Patricia that she had had an incomplete miscarriage and that in order to get relief she would have to go to the hospital and have a curettment. He advised her that it would cost between $600 and $700, whereupon he said Patricia gave him $400 and asked him to make the necessary arrangements and said that she would return with the rest of the money.

Dr. Cohen testified that the next time he heard anything about Miss Hanley was on June 6, 1963, when the district attorney's investigator apprised him of the abortion charge. The appellant stated that upon being informed of Miss Hanley's complaints he retained Mr. Jacobson to safeguard his interests and to return the $400.

The Hypothetical Questions.

The defendant claims that his conviction was erroneous because the evidence shows that Miss Hanley was already in the process of aborting when she first met with him. In support of his contention, the defendant relies upon his own testimony, upon certain evidence given by Miss Hanley, and upon the opinions of two Milwaukee gynecologists, Dr. Alvin Kurzon and Dr. Richard Mattingly.

The two medical doctors, in response to hypothetical questions, concluded that Miss Hanley was in "some phase of miscarriage" or "in the process of an inevitable or imminent abortion." Such opinions were clearly based upon the hypothesis that she had been bleeding and that there were blood clots in her vagina prior to her visit to the defendant's office.

Dr. Mattingly, upon inquiry by Judge Steffes, testified that the amount of bleeding and the existence of blood clots would be the significant factor upon which he would base his opinion regarding the inevitability of the miscarriage. He also testified that the taking of ergot pills would cause the uterus to contract, thereby restricting the amount of bleeding. Dr. Mattingly further stated that the prior taking of quinine pills and a mustard bath would have no significance or relevancy.

The trial court rejected the defendant's testimony as untrue and untrustworthy. Accordingly, it is crucial to the success of the appellant's argument that the opinions of the medical doctors were based on facts which were competently established by testimony other than that of Dr. Cohen.

To prove the truth of his contention that Miss Hanley had in fact been bleeding before she visited the doctor's office, the appellant points to the statement that Miss Hanley had given to Mr. O'Connell on June 23, 1963, which contains the following:

"Well, I was bleeding before I went but I went in for the purpose of an abortion."

At the trial, however, Miss Hanley contradicted the foregoing statement and testified that she had not been bleeding previously.

In the same statement given on June 23, 1963, Miss Hanley was asked what Dr. Cohen had told her would happen at his office, and she replied, "He said that he would remove certain clots that had already formed and would try to remove the rest." This answer, however, was crossed out, and the following words were written in after the answer and initialed by Miss Hanley: "This answer was untrue." At the trial she denied that Dr. Cohen had told her that he was going to remove clots that had already formed.

It is our opinion that conflicting evidence was presented to the trier of fact as to whether Miss Hanley had been bleeding before she went in to see the doctor and also as to whether there were blood clots formed prior to such visit. The version of the facts urged by the appellant was sufficiently controverted so as to leave it peculiarly within the scope of the trial court whether to believe it or to disbelieve it.

The failure to give credence to the medical opinions would necessarily follow if the lower court did not believe the essential facts assumed in the hypothetical questions. The total dependence of such opinions upon the validity of the facts assumed in the hypothetical questions was clearly stated by this court in *Kreyer* v. *Farmers' Co-operative Lumber Co.* (1962), 18 Wis. (2d) 67, 77, 117 N.W. (2d) 646:

> "The purpose of a hypothetical question is to give the jury the benefit of an expert opinion upon one or another of several situations which may be found to exist in the evidence. The key point in a hypothetical question is the facts that are assumed and form the premises. If these facts fail in any important particular then necessarily the answer or conclusion that assumes the facts must fail."

Additional cases in which this court has pointed out that an infirmity in the hypothesis attaches to the answer founded upon it are *McGaw* v. *Wassmann* (1953), 263 Wis. 486, 492, 57 N.W. (2d) 920, 58 N.W. (2d) 663; *State* v. *Timm* (1944), 244 Wis. 508, 515, 12 N.W. (2d) 670; *Will of McGovern* (1942), 241 Wis. 99, 107, 108, 3 N.W. (2d) 717.

Other Claimed Exculpating Factors.

The appellant points to a number of other circumstances which, it is urged, demonstrate that there must be a reasonable doubt that Dr. Cohen did in fact perform an abortion. Miss Hanley was not given an anesthetic at the time she was in Dr. Cohen's office, and it is claimed that this is inconsistent with a planned abortion. This fact is pressed particularly in light of the contention that she did not complain of great pain at the time of the events in the doctor's office. However, she testified that she did endure pain, and we do not find impressive the contention that the absence of either an anesthetic or excruciating pain must necessarily outweigh the other evidence that an abortion was performed.

Reference is also made by the appellant to the fact that a few minutes after she dressed herself and left Dr. Cohen's examining room Miss Hanley walked out of his office, unaided, and took a bus back to her hotel. After resting for only an hour and a half at the hotel, she returned by train to Minneapolis. It is contended that this amount of movement by her within such a short time after the alleged abortion would have been accompanied by great discomfort and profuse bleeding. It is the appellant's claim that her extensive movements and the absence of bleeding demonstrate that an abortion did not actually occur. On the other hand, the record discloses that the doctor gave Miss Hanley ergot pills to check the bleeding, and further it appears that she wore a pad.

When Miss Hanley telephoned Dr. Cohen from Minneapolis a few weeks after visiting his office and advised him that she was hemorrhaging, she was told by Dr. Cohen to consult her family physician. It is the appellant's contention that this advice was inconsistent with a guilty mind and suggests Dr. Cohen's innocence. The trial court was entitled to evaluate the significance of this testimony and may well have concluded that it was either a desperation move on the part of the defendant or it may have reflected his confidence that Miss Hanley would not want to get "involved" with a criminal prosecution. We recognize that we are speculating on the impact of this testimony upon the trial court, but we are persuaded that it is not of such significance as to warrant a reversal.

Conclusion.

In our opinion, the defendant's guilt or innocence depended on the credibility of the witnesses. If Dr. Cohen's testimony had been believed, a different result would irresistibly have followed. However, the trial court gauged his credibility "at the very lowest degree" and added, with reference to Dr. Cohen's testimony, that "the air was figuratively pungent with the acrid fumes of perjury."

The appraisal of the relative credibility of the several witnesses was a proper function of the trial court and one which this court finds no basis for upsetting. *Drane* v. *State* (1965), 29 Wis. (2d) 208, 211, 138 N.W. (2d) 273; *Gauthier* v. *State* (1965), 28 Wis. (2d) 412, 417, 137 N.W. (2d) 101.

By the Court. — JUDGMENT AFFIRMED.

APPENDIX B

Wisconsin Statutes, 1963:

Section 940.04(1) ABORTION. Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both.

APPENDIX C

UNCONTRADICTED PHYSICAL AND MEDICAL FACTS WHICH WERE PUT TO THE ONLY TWO GYNECOLOGISTS WHO TESTIFIED IN THE CASE.

1. Expert opinion of Dr. Alvin M. Kurzon, diplomate of the American Board of Obstetrics and Gynecology practicing in Milwaukee, Wisconsin:

* * *

(printed Record pp. 175-177)

Q. Now, that last assumption, which is a repetition of my previous lengthy hypothetical question, I will ask you to delete from your consideration at the moment, but I will ask you to assume or take all of the additional assumptions that I put in the question, and in order that there be no mistake about it, I will repeat the assumptions that I wish you to keep in mind, deleting the first one—now, these are the ones I will ask you to assume:

That the girl's last menstrual period was February 26, 1963, and that she missed her menses for the following month of March;

Next, that three Prostigmin shots were given to her and a test made to determine pregnancy about April 10, 1963, the results of which were positive for pregnancy;

That the girl thereupon determined to bring about an abortion of her pregnancy;

That the girl, pursuant thereto, took a number of quinine pills and a mustard bath to induce an abortion;

Next, that during this period she had cramps;

Next, that on April 19 and 20 she took a long train ride from Minneapolis to Milwaukee;

Next, that she was bleeding before she came to the doctor's office on April 20th;

Next, that she had blood clots in her vagina that had already formed before she came to the doctor's office;

Next, that she was given no anesthetic during any of the time that she was in the doctor's office and did not cry out or experience any appreciable pain during that time;

Next, that after the doctor finished with her she was not bleeding very much and she had no padding or packing on her, nor did the doctor suggest the same;

Next, that immediately thereafter, without difficulty or assistance, she dressed herself, walked down the stairs onto the street, took a bus to the Schroeder Hotel and, thereafter, a train ride back to Minneapolis;

Now, having in mind just those last enumerated assumptions, would that change your opinion as to her condition before—just before she came to the doctor's office?

A. No, my opinion would remain the same. (See printed Record p. 174) (The presence of blood in the vagina in a female in which a diagnosis of pregnancy had previously been substantiated, would to me indicate that an abnormal situation was in progress; that this abnormal situation was related to the pregnancy; and that the probable cause of this abnormal condition was some phase of a miscarriage.)

Q. Doctor, if a person—a pregnant woman, as described in my question, the length of pregnancy and the same age—if instruments are introduced into her uterus and the cervix is not dilated in any way, but the pregnancy is intact, and a portion of the contents of the uterus are extracted, a substantial portion, what can you say about the probabilities and usual reaction of a person from such a procedure—first, with regard to pain?

* * *

Q. Did you understand the question? Will you state what the usual reaction in such a person is in regard to pain, without any anesthetic and with an undilated cervix?

A. In accomplishing that which you have described, the patient would have a considerable amount of pain and discomfort. Secondly, this would be attended with a considerable amount of blood loss. Thirdly, following the completion of this, as you described, it would be my judgment that bleeding would continue."

2. Expert opinion of Dr. Richard F. Mattingly, Professor and Chairman of the Department of Gynecology and Obstetrics of Marquette University School of Medicine and Director of the Department at the Milwaukee County

Hospital and also a diplomate of the American Board of Obstetrics and Gynecology:

(see printed Record, pp. 180-183)

"Q. Now, Doctor, I will ask you another question —I will ask you to delete the first assumption that I gave to you, but I will ask you, however, to keep in mind and assume all the subsequent assumptions after the first, and I will repeat those so that there will be no misunderstanding in that regard, and I will ask you to assume these facts:

That the girl's last menstrual period was February 26, 1963, and that she missed her menses for the following month of March;

Next, that three Prostigmin shots were given her and a test made to determine pregnancy about April 10, 1963, the results of which were positive for pregnancy;

Next, that the girl thereupon determined to bring about an abortion of her pregnancy;

Next, that the girl pursuant thereto, took a number of quinine pills and a mustard bath to induce an abortion;

Next, that during this period she had cramps;

Next, that on April 19 and 20 she took a ride on a train from Minneapolis to Milwaukee;

Next, that she was bleeding excessively from the vagina before she came to the doctor's office on April 20;

Next, that she had blood clots in her vagina that had already formed before she came to the doctor's office;

Next, that she is given no anesthetic during any of the time that she is in the doctor's office and does not cry out or experience any appreciable pain during that time;

Next, that after the doctor finished with her she was not bleeding very much and she had no padding or packing on her nor did the doctor suggest the same;

Next, that immediately thereafter, without difficulty or assistance, she dressed herself, walked down the stairs out onto the street, took a bus to the Schroeder Hotel and, thereafter, a train ride back to Minneapolis;

Now, Doctor, based on those enumerated assumptions, will you state whether or not you have an opinion, based upon a reasonable degree of medical probability, as to the condition of her pregnancy at and immediately prior to her visit to the doctor's office on April 20?

A. Yes, I believe I could render an opinion.

Q. And what is that opinion?

A. In the event that all of these facts exist and that the patient was pregnant, and that there was a significant degree of bleeding from the cervix—from the vagina—this patient would still be classified as in the process of an inevitable abortion and this would be related to the amount of bleeding that occurred.

Q. Doctor, if a person, such as a doctor, entered into the uterus through the cervix of a female who was about two months or a little less pregnant, and the pregnancy is intact, that is, there is no dilation of the cervix, and a substantial part—let us say—well, let us say a substantial part of the contents of the uterus

are removed, but there is left in the uterus, also, a substantial part of its contents, what can you say about the usual and probable reactions or results of such an operation with respect to the sensation of pain on the part of the woman?

A. I believe it would be quite painful in an undilated cervix in an 18-year-old patient, who has had no previous child.

* * *

Q. Having in mind the same facts, having in mind that a substantial part had been removed, and a substantial part remains in the uterus, what is the usual, probable result immediately thereafter with respect to bleeding?

A. If only a portion of the product of conception has been removed, there would be unquestionably continued bleeding from this placental site.

Q. Of what character?

A. I believe the patient would hemorrhage and continue to hemorrhage until this was removed.

Q. And what is the usual, probable course of bleeding so far as duration is concerned, under those circumstances, a few days or longer?

A. This would be initiated immediately by an interruption of part of the placenta and would continue until the placenta would be completely separated—so one would have, in essence, most likely, an immediate source of bleeding, which would continue."

APPENDIX D

UNEXPLAINED PRIOR SELF-CONTRADICTIONS OF MISS HANLEY, THE ONLY WITNESS FOR THE PROSECUTION ON THE MAIN ISSUE; PRIOR BLEEDING.

(See printed Record, pp. 128, 129)

"Q. Now, excuse my somewhat embarrassing question, but, Patricia, it is true, is it not, that when you went to the toilet, prior to the time you came down to Milwaukee, that you noticed some small blood cots?

A. No.

Q. Pardon?

A. No.

Q. Did you notice some large blood clots?

A. No.

Q. You say 'no'. You were bleeding, however, before you came to Milwaukee, were you not?

A. I was not bleeding.

Q. You were not, you say?

A. I was not.

Q. Now, Miss Hanley, I want to call your attention to an answer you made on page 8 and I want to show it to you so you will see exactly what I have in mind—page 8, two thirds down.

The Court: Still Exhibit B?

Mr. Kersten: Exhibit B.

'Q. Now, with regard to what he told you to say in your letter, that was not the truth, was it?

A. Well, I was bleeding before I went, but I went in for the purpose of an abortion.'

Q. That's the answer you made on that occasion is it not?

A. Yes."

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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 594

LEWIS COHEN,

Petitioner,

vs.

THE STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BRONSON C. LA FOLLETTE
Attorney General

BUGLE R. GOODNELL
District Attorney
Milwaukee County

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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. .....

LEWIS COHEN,

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THE STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

Respondent opposes the granting of a writ of certiorari on the ground that no substantial federal question is presented, the sole question being the sufficiency of the evidence to sustain the conviction, questions of credibility having been resolved by the state trial court.

QUESTION PRESENTED FOR REVIEW

Whether any question of a denial of due process of law under the provisions of the Fourteenth Amendment of the United States Constitution was presented to the Supreme Court of the State of Wisconsin on appeal or was involved in any manner in the opinion of that court affirming the conviction of the defendant.

STATEMENT OF THE CASE

On April 2, 1963, Patricia Hanley, an unmarried girl, 18 years of age, residing in Minneapolis, Minnesota, consulted a physician in that city, one Dr. Elsie Riordan. Patricia advised Dr. Riordan that she had failed to have a menstrual period since February 1963 and suspected that she was pregnant. Dr. Riordan examined Patricia and administered a standard pregnancy test over a three-day period. This test consisted of three injections of prostigmin, a drug which produces the menstral flow, as a rule, if the patient is not pregnant. Patricia did not respond to the drug and Dr. Riordan arranged a frog test for her at the Lufkin Laboratory in Minneapolis in order to definitely diagnose Miss Hanley's condition. On April 12, 1963, the frog test was had and the results showed Patricia to be pregnant.

From the time Patricia first suspected her condition, she had discussed her problem with Roberta Dahl, an 18-year-old girl who had been her classmate in high school and was her close friend. Patricia told Roberta that she was desirous of having a miscarriage and Roberta suggested quinine pills and a mustard bath. Patricia acted on those suggestions but to no avail. Subsequently Roberta Dahl advised her of a physician in Milwaukee, Wisconsin, who would perform an abortion for $400. Roberta indicated that the doctor had performed such an operation on her in March of 1963. Roberta Dahl testified regarding the specifics of that operation. On April 16 or 17, 1963, the girls placed a telephone call from the Dahl home in Minneapolis to the defendant-petitioner, hereinafter referred to as the defendant, in Milwaukee. Miss Dahl told the de-